

STATE OF MICHIGAN
COURT OF APPEALS

VALERIE HAMMOND,

Petitioner-Appellee,

v

CIVIL SERVICE COMMISSION,

Respondent-Appellant.

UNPUBLISHED

July 16, 2013

No. 309704

Ingham Circuit Court

LC No. 11-000422-AA

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals by leave granted the trial court order that reversed respondent's dismissal of petitioner's long-term disability (LTD) benefits claim. We reverse and remand.

Petitioner worked as a prison nurse for 18 years until she left work in February 2007 after being brutally assaulted by an inmate. She received LTD benefits predicated on diagnoses of posttraumatic stress disorder (PTSD), panic disorder with agoraphobia, major depressive disorder, and generalized anxiety disorder. After receiving LTD benefits for two years, petitioner was evaluated to determine whether she could return to any reasonable employment. On the basis of medical opinions, the state's third-party administrator of its LTD plan, Citizens Management, Inc. (Citizens), terminated petitioner's LTD benefits on February 28, 2009.

Petitioner filed a Level I appeal of the LTD benefits. In a letter dated December 7, 2009, Citizens denied the appeal. Petitioner then filed a Level II appeal, and in a letter dated May 18, 2010, Citizens again denied the appeal. The letter informed petitioner that she had the right to appeal the denial to the Office of the State Employer (OSE) within 14 calendar days, citing "Civil Service Regulation 5.18: 4.B.2.b.(1)(b)."¹ In other words, petitioner had until June 1, 2010, to timely appeal to the OSE. On June 14, 2010, petitioner's counsel sent a letter to

¹ A review of the most recent Civil Service Regulations (updated March 4, 2012) reveals that the codification and language of this regulation has changed. However, the relevant portions remain intact. An appeal from a denial of LTD benefits by a third-party administrator must be filed with the OSE within 14 calendar days after the TPA's final decision. Civil Service Regulation 5.18(4)(A)(3).

Citizens asserting that he had not received a copy of the May 18, 2010, denial letter until June 10, 2010, when petitioner mailed him a copy. Counsel requested an extension to file the appeal until July 2, 2010.

On July 2, 2010, petitioner filed her Level III appeal with the OSE. Counsel again claimed that he did not receive a copy of Citizens' May 18, 2010, denial until petitioner sent him a copy on June 10, 2010. The OSE administratively dismissed petitioner's appeal, noting that it was filed 31 calendar days late. The letter cited the applicable Civil Service Regulations that provide that an appeal filed 31 days late must be accompanied by a written explanation establishing "special extenuating circumstances" in order to avoid dismissal. The OSE determined that petitioner's appeal did not meet any of the criteria for special extenuating circumstances and administratively dismissed the case. The OSE explained that copies of the May 18, 2010 denial were sent by certified mail to both petitioner and counsel. On May 19, 2010, Carol Holden signed for counsel's receipt on behalf of his law office.

Petitioner then filed a Level IV appeal with the State Personnel Director (SPD). Counsel attempted to establish special extenuating circumstances by writing as follows:

Contrary to my prior letter, apparently a document was sent by Citizen's Management that was signed by Carol Holden. Ms. Holden, while two stories away from me in our building, does technically work for my firm. However, Ms. Holden by and large, performs services for Charles Rousseau, who rents space from my firm and is a separate and distinct entity. Neither me, nor my assistant Becky, ever received the document you sent and, until you sent the certified card in this letter we had still not seen it.

* * *

I believe that the situation is a special extenuating circumstance as, without receipt of the denial, I could not very well have responded. I obviously would not have written that we did not receive a copy had I know that Ms. Holden signed a certified letter acknowledging the same.

On September 15, 2010, the State Personnel Director issued a benefits review decision upholding the denial (Benefits review decision, 9/15/10). The BRD decision concludes:

The appellant's Level 3 LTD appeal was filed 31 calendar days late, and the appellant has failed to establish the required special extenuating circumstances for the late filing. The Level 3 appeal decision of the OSE was consistent with existing [Michigan Civil Service Commission (MCSC)] rules and regulations. The administrative dismissal of the appellant's claim is upheld. The requested relief, therefore, is denied.

The decision also noted that the only issue dealt with petitioner's untimely appeal, and did not address any of the underlying medical issues.

On October 13, 2010, petitioner applied for leave to appeal the BRD to the Employment Relations Board (ERB). On December 17, 2010, the ERB recommended that the MCSC deny

petitioner's application for leave. On February 7, 2011, the MCSC approved the ERB's recommendation and adopted the recommendation as the final decision in petitioner's case.

Petitioner thereafter appealed to the circuit court. On March 2, 2012, after hearing oral argument, the court reversed the dismissal, stating:

All right, sir. I read these rules. I don't like them. I guess you can appeal me, because I think there is sufficient justification, and I certainly see how it happened, and to rest this on a secretary who is busy, who's not a lawyer, who doesn't understand the counting of the days or probably follow the docket control of this particular case, because— she's a receptionist; is that right?

* * *

. . . We don't get to the merits of this right now. We get to this counting of days, and I don't want to prejudice your client because of some receptionist who takes the mail and sat on it or didn't understand the importance of it, and so I'm finding that I'm not going to prejudice a party because of that. I'm hoping that in the future you handle things differently in your office and I'm finding that it is a compelling excuse. I don't think anybody intentionally meant to do anything to anybody. I don't care what happened between all of you in the past. I think this is the right thing to do. If anybody doesn't like it, appeal me. That's my ruling.

On March 26, 2012, the trial court reduced its ruling to writing, finding that "Petitioner has demonstrated extenuating circumstances for her brief being thirty-one (31) days late in the Administrative Review Process." The court remanded the case for further briefing at the administrative level and retained jurisdiction. We granted respondent's application for leave to appeal.

The circuit court erred by reversing respondent's dismissal of petitioner's claim for LTD benefits.

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . . [Const 1963, art 6, § 28.]

Petitioner's case was not one "in which a hearing [was] required," Const 1963, art 6, § 28, and therefore "it is not proper for the circuit court or this Court to review the evidentiary support of [the] administrative agency's determination," *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991). "[I]n cases in which no hearing is required, [decisions] are reviewed to determine whether the decisions are authorized by law." *Ross v Blue Care Network of Michigan*, 480 Mich 153, 164; 747 NW2d 828 (2008), citing Const

1963, art 6, § 28. “Decisions not ‘authorized by law’ include those that violate a statute or the Constitution, those that are in excess of statutory authority or an agency’s jurisdiction, those made upon unlawful procedures that result in material prejudice, and those that are arbitrary and capricious.” *Westcott v Civil Serv Comm*, 298 Mich App 158, 162; 825 NW2d 674 (2012). “A ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is freakish or whimsical.” *Id.*

In this case, the circuit court exceeded the applicable scope of review. The court was limited to determining whether respondent’s decision was authorized by law. Instead, the court impermissibly delved into the evidentiary record and determined that petitioner had shown the special extenuating circumstances necessary to avoid dismissal. Whether petitioner had established special extenuating circumstances was not for the circuit court to decide.

Additionally, respondent’s dismissal was authorized by law. Civil Service Regulation 8.06(3)(C)(4) provides as follows:

A document filed late in a Civil Service proceeding shall be denied as untimely unless accompanied by a written explanation of the reasons for the late filing that established either good cause or special extenuating circumstances. If the late filing is not accompanied by a written explanation or if the explanation fails to establish required good cause or special extenuating circumstances, the filing is dismissed as untimely.

* * *

(b) A filing that is over 28 calendar days but less than 1 year late shall be denied as untimely, unless the filing party establishes special extenuating circumstances.

“Special extenuating circumstances” is defined as follows:

Special extenuating circumstances means a compelling excuse for the failure to file a matter timely that arises out of one of the following:

(a) An intentionally or fraudulently misleading action by an appointing authority or party that prevented the filing.

(b) Serious physical or mental incapacity of the person that prevented the filing.

(c) Extraordinary unforeseen circumstances outside the control of the person that prevented the filing. [Civil Service Regulation 8.06(2)(A)(2).]

Petitioner’s assertion that his counsel did not timely receive the May 18, 2010, denial letter due to an inter-office miscommunication clearly does not fall under Civil Service Regulation 8.06(2)(A)(2)(b), nor does it constitute [e]xtraordinary unforeseen circumstances outside the control of the person that prevented the filing.” If the facts are as stated, the

possibility that Holden might not transmit mail immediately upon receipt is certainly foreseeable. Moreover, counsel admitted that Holden “does technically work for my firm,” which indicates that he possessed a level of control over the circumstances surrounding the delivery of correspondence received by her.

Petitioner’s allegations of fraud on the part of respondent were first raised in the circuit court and are without merit or support in the record. On June 14, 2010, after the expiration of the 14-day appeal period, petitioner’s counsel sent a letter to Citizens, not respondent, alleging that he had not received the May 18, 2010, denial letter until June 10, 2010, and requesting that he be allowed until July 2, 2010, to file an appeal. Petitioner now contends that this letter should have informed respondent of his failure to receive the May 18, 2010, denial letter, and therefore respondent was required to notify him that Holden had signed for the letter on May 19, 2010. However, because counsel sent the letter to Citizens, not respondent, petitioner cannot show that respondent was aware of the letter and requested time extension. Petitioner was required to file her Level III appeal with the OSE, not Citizens. Civil Service Regulation 5.18(4)(A)(3)(a). This situation does not constitute “[a]n intentionally or fraudulently misleading action” on the part of respondent. Civil Service Regulation 8.06(2)(A)(2)(a).

For the foregoing reasons, we reverse the circuit court’s decision and remand for reinstatement of respondent’s dismissal of petitioner’s claim for LTD benefits. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Pat M. Donofrio